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No. ——

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

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WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
*Petitioner*,

v.

GENERAL RAILWAY SIGNAL COMPANY,
A SUBSIDIARY OF GENERAL SIGNAL INC.,
*Respondent.*

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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## QUESTIONS PRESENTED

### Question 1

May the District Court, while purportedly conducting a Wunderlich Act type judicial review, under a contract containing a standard disputes clause, recharacterize the dispute as an implied breach of contract and remand the matter to the administrative review process for a *de novo* hearing in order for the Court to fashion a breach of contract remedy, thus requiring Petitioner to defend the interest issue in two distinct forums without reviewing the initial administrative decision under the contractually mandated Wunderlich Act principles? Concomitantly, may the courts below refuse to follow the applicable decisions on issues previously decided by this Court?

### Question 2

May the District Court, in its application of the law of the District of Columbia to contract claims against Petitioner, refuse to apply the applicable District of Columbia statute of limitations where the WMATA Compact, a Federal statute, mandates uniform application of the laws of the District of Columbia?

### Question 3

May the Court of Appeals decide an issue in conflict with the decision of the state (or equivalent) court of last resort? *

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* The parties to this petition are: *Petitioner*, Washington Metropolitan Area Transit Authority, a body corporate and politic, created pursuant to the Act of November 6, 1966, Pub. L. 89-774, 80 Stat. 1324, as amended ("the WMATA Compact"), as an agency and instrumentality of the State of Maryland, the District of Columbia, and the Commonwealth of Virginia; *Respondent*, General Railway Signal Company, a subsidiary of General Signal Inc., a corporation organized and existing under the laws of the State of Delaware and having its principal place of business in Rochester, New York.

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioner, Washington Metropolitan Area Transit Authority (WMATA), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit, entered in this proceeding on December 10, 1980, affirming a judgment and opinion entered by the United States District Court for the District of Columbia.

A motion for rehearing *en banc* was denied by the Court of Appeals on January 8, 1981.

## OPINIONS BELOW

The opinion of the Court of Appeals of which Petitioner seeks review is as yet unreported; a copy is appended as Appendix A. The order of the Court of Appeals denying Petitioner's request for a rehearing *en banc* is unreported; a copy is appended as Appendix B. The Memorandum Opinion and Order of the District Court ordering a trial *de novo* on entitlement to interest for delay in issuing a final decision is unreported; a copy is appended as Appendix D. The order of the District Court ordering the payment of breach of contract interest damages pursuant to Title 15, § 109, of the District of Columbia Code is unreported; a copy is appended as Appendix C. The Opinion and Findings of Fact of the Corps of Engineers Board of Contract Appeals on the initial administrative hearing which was approved and adopted by Petitioner's General Manager is reported at 76-2 BCA ¶ 12,223; a copy is appended as Appendix E. The opinion of the Board of Contract Appeals for the second administrative hearing which was modified by Petitioner's General Manager is reported at 79-1 BCA ¶ 13,622; a copy, as modified, is appended as Appendix F.[1]

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[1] Chapter V of WMATA's Procurement Policies and Procedures, entitled "Contract Claims and Disputes," adopted July 7, 1967, and revised March 21, 1968, and October 2, 1969, provides: "c. *Appointment.* The General Manager is hereby designated and appointed as the duly authorized representative of the Board of Directors of the Washington Metropolitan Area Transit Authority to hear, consider and *decide* [emphasis added] as fully and finally as the Board of Directors might do, appeals to the Board of Directors under contracts which contain the 'Disputes' clause hereinabove set forth."

By Resolution of the WMATA Board of Directors dated June 3, 1971, it was resolved "by the Board of Directors of the Washington Metropolitan Area Transit Authority that the Corps of Engineers Board of Contract Appeals is hereby designated as the authorized representative of this Board to hear, consider and *recommend* [emphasis added] to the General Manager of the Authority final

## JURISDICTION

The judgment of the Court of Appeals was entered on December 10, 1980 (App. A). A petition for rehearing *en banc* was denied on January 8, 1981 (App. B). This petition is filed within ninety days of both dates. This Court is therefore vested with jurisdiction to review the judgment in question upon issuance of a writ of certiorari, pursuant to 28 U.S.C. § 1254(1).

## STATUTES

Washington Metropolitan Area Transit Authority Compact, the Act of November 6, 1966, Public Law 89-774, 80 Stat. 1324, as amended by the Act of July 13, 1972, Public Law 92-349; the Act of October 21, 1972, Public Law 92-517; and the Act of June 4, 1976, Public Law 94-306. Partial text at Appendix I.

Code of the District of Columbia, as amended:

Title 12, § 301, at Appendix J; Title 15, §§ 108 and 109, at Appendix K.

Wunderlich Act, 41 U.S.C. §§ 321-322; at Appendix L.

## STATEMENT OF THE CASE

Jurisdiction in the United States District Court for the District of Columbia is statutory pursuant to § 81, WMATA Compact (App. I).

On February 23, 1971, Petitioner awarded WMATA Contract No. 1Z4206 to Respondent for modification of the Washington Terminal Company's signal facilities at Union Station in Washington, D.C., in order that said

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decisions on appeals arising under the Disputes clause of Authority contracts and the General Manager is authorized and directed to reimburse the Corps of Engineers for all costs in rendering such services." (App. X)

facilities could be used by the Washington metropolitan area metrorail system.

During contract performance, three disputes arose between the parties concerning alleged extra work required by Petitioner. The latter considered the work to be within the terms of Respondent's contract and not to constitute a change so as to entitle the Respondent to additional compensation.

The disputes article of the instant contract, substantially identical to that of U.S. Standard Form 23-A, Construction Contract (App. H), established a two-tiered administrative review procedure comparable to the disputes procedure under Federal Government contracts prior to the implementation of the Contract Disputes Act of 1978, 41 U.S.C. § 601 et seq., 92 Stat. 2383, which is not applicable to Petitioner, a state agency. Pursuant to this procedure, disputes arising under the contract and not resolved by agreement between the parties are initially decided by Petitioner's Contracting Officer, whose decision is final and conclusive unless a written appeal, addressed to Petitioner's Board of Directors, is filed within thirty days thereafter (App. H). In the instant case, formal claims for additional compensation in each of the three disputed areas were submitted to Petitioner's Contracting Officer. The latter denied each claim in a formal written final decision and finding of fact. The final decision for the Wye interlocking claim was issued on August 2, 1974, and that for double circuitry on March 24, 1975.[2] Respondent timely appealed each such denial.

The second tier of administrative review pursuant to the contract disputes clause involves the review of the Contracting Officer's final decision by WMATA's

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[2] Formal claims had been made on Dec. 13, 1973, and Aug. 20, 1973, respectively. The third claim was resolved adversely to Respondent and is not at issue here.

Board of Directors or its duly authorized representative. WMATA's General Manager has been designated to decide, as fully and finally as the WMATA Board of Directors might do, contractor appeals to the Board of Directors. The WMATA Board of Directors also provided for these appeals to be heard and considered initially by the Corps of Engineers Board of Contract Appeals, an independent Federal Government agency authorized to recommend to WMATA's General Manager decisions on appeals arising under the disputes clause of WMATA contracts.

By an administrative decision dated August 30, 1976, the Board of Contract Appeals recommended allowance of two of Respondent's three appeals for stipulated quantum amounts, but denied payment of interest thereon (App. E). In its complaints to the Board of Contract Appeals in these appeals, Respondent had not presented a claim for interest or alleged any factual or legal basis therefor (App. M, N). By letter dated January 5, 1976, counsel for Respondent had informed WMATA's trial counsel that, at the commencement of the Board of Contract Appeals hearing on January 12, 1976, Respondent would request that its complaints be amended to include claims for interest. This was never done. (App. U)

As a unilateral addendum to a pretrial stipulation on the quantum of an equitable adjustment in each administrative appeal, Respondent voiced its claim for interest in the respective amounts of $5,348 and $32,507, computed on the basis of 1 percent per month for a period of 24 months, this period represented a purported delay in the negotiation of equitable adjustments. Petitioner did not admit or agree to the payment of interest at any time.

In the administrative post-hearing brief, Respondent first raised the interest issue and claimed interest as a component of the equitable adjustment at the legal rate

applied under substantive contract law. Respondent requested the Board of Contract Appeals to re-examine its prior decision in *Granite Construction Company* (Eng BCA No. 3561, 76-1 BCA ¶ 11,748), which also involved an interest issue, on the basis that precedent cases, including United States Government contracts, denying interest were grounded in principles of sovereign immunity, a bar not applicable to Petitioner's contracts (App. O). Respondent offered no proof of any kind with respect to entitlement to interest during the initial administrative hearing. (App. P, Q and R)

In its recommended decision, the award of interest was denied by the Board of Contract Appeals because it declined to "allow a percentage for interest where we find a constructive change has been made even though there has not been shown that any interest cost was occasioned by the change" (App. E). The Board reaffirmed its view that the *Granite* appeal was correctly decided. Petitioner's General Manager accepted the recommendation of the Board of Contract Appeals and adopted its advisory opinion in his final decision dated September 21, 1976 (App. E).

Respondent filed its complaint in the United States District Court for the District of Columbia on April 14, 1977, alleging that it was entitled to interest as an "equitable adjustment of the contract price" (App. S, ¶¶ 17 and 27). Jurisdiction in contract actions against Petitioner is conferred on that court by the WMATA Compact, § 81 (App. I).

Petitioner then moved, on May 19, 1977, for summary judgment, contending that an equitable adjustment presents a wholly factual issue and that its General Manager's decision thereon was final and conclusive unless otherwise determined by a court of competent jurisdiction to be unsupported by substantial evidence, arbitrary, capricious, or so grossly erroneous as to imply bad faith, or was otherwise legally incorrect.

Respondent replied, seeking either a *de novo* hearing for an equitable adjustment, to include interest on borrowings, or a supplemental profit allowance, or, in the alternative, an interest award in the amount of 24 percent.

During oral argument before the District Court on July 13, 1977, Respondent's counsel admitted that Respondent's claim before that court was for a Wunderlich review of the action by Petitioner's General Manager dated September 21, 1976, as follows:

> THE COURT: What is the extent of the review before this Court?
>
> MR. EGGERS: We agree, Your Honor, that under the Disputes clauses that the standard review is in essence the Wunderlich standard and that is that factual issues as determined by the Board are binding in the absence of the standard that the contract states which is in essence the findings were contrary to the record, fraudulent, capricious and arbitrary. The issues of law, Your Honor, are in no way binding and we believe that the issue that is before this Court is whether the Board has applied fundamentally the correct law as to the interest. (App. G)

In its August 5, 1977 Memorandum Opinion and Order, the District Court, instead of reviewing the record pursuant to Wunderlich Act principles, concluded that: "Implicit here is a charge that WMATA breached the contract by extensively delaying resolution of plaintiff's claim" (App. D). This, notwithstanding that Respondent's complaint before the District Court did not allege that WMATA breached its contract but rather that the Board of Contract Appeals' denial of interest on its claims was "wrongful." The court then stated that if the Board of Contract Appeals, upon remand, found that Petitioner's Contracting Officer had unreasonably delayed processing Respondent's claim, then the latter might re-

cover interest resulting from the delay in payment, pursuant to Title 15, § 109, D.C. Code (App. K). This statute authorizes the recovery of interest on a judgment solely for damages for breach of contract or tort. The District Court, *sua sponte*, had thus effectively recharacterized Petitioner's request for judicial review, pursuant to Wunderlich Act standards, as an implied breach of contract claim.[3]

The parties filed cross motions and oppositions thereto for reconsideration of the court's order.[4] Your Petitioner's motion reasserted its position that the court, under the terms of the contract between the parties, could not order a *de novo* hearing pursuant to the settled decisions of this Court, and that a claim originally alleged under the contract could not, upon an adverse decision, be recharacterized as a breach of contract in order to obtain a retrial of the same factual issue. The Respondent contended that:

> "The contractual claim for extra work is initially litigated before the Board [of Contract Appeals] under the disputes clause. It is equally true, however, that the nature of this claim is such that the average person would consider it to be a claim for

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[3] ". . . where the administrative agency has made relevant factual findings in the course of refusing relief which the contract authorizes it to give, the finality of these findings, if sufficiently supported, cannot be avoided in a court action for the same relief by labeling the refusal of an equitable adjustment as a breach of contract or by asserting that the primary issue involved is a question of law." *United States* v. *Utah Constructing and Mining Company*, 384 U.S. 394, 419-420, 86 S. Ct. 1545, 16 L.Ed.2d 642, 659 (1966).

[4] Petitioner's Motion for Reconsideration, Aug. 11, 1977; Respondent's Cross Motion for Reconsideration, Aug. 18, 1977; Petitioner's Opposition to Respondent's Cross Motion for Reconsideration, Aug. 25, 1977; Respondent's Reply Memorandum, Sep. 2, 1977 (App. W); Petitioner's Response to Respondent's Reply Memorandum, Sep. 9, 1977.

a breach of contract litigated in an administrative form." (App.W)

Upon remand and a further administrative hearing, the Board of Contract Appeals made several findings of fact in regard to the issuance of the Contracting Officer's final decision and concluded its advisory opinion with:

> "However, it is quite clear in the present case that the time taken for consideration of the claim at the Resident Engineer and the Contracting Officer level, while not unusual, especially in view of appellant's lack of assertive action pressing for an early decision, was much too long when all of the circumstances are considered. For that reason the question posed by the District Court must be answered in the affirmative. There was too much delay in processing the claims from which the appeals arose." (App. F)

Petitioner's General Manager adopted and approved the findings of fact arrived at by the Board of Contract Appeals. However, the ultimate paragraph, quoted above, was not approved, as it was considered to be inconsistent with local law. The General Manager's decision cited a recent District Court case, *John H. Wilson, Inc.* v. *Granite Groves*, Civil Action No. 78-1498, December 22, 1978 (App. V), where, in the absence of a refusal by the Contracting Officer to issue a final decision and in consideration of other pertinent circumstances, delays of 21 months and 16 months, respectively, for issuance of Contracting Officer's final decisions did not render the administrative process so untimely as to support an action for breach of contract based solely on such delay.

The matter once again came before the District Court on the parties' cross motions for summary judgment. Petitioner argued, in part, that, had this matter been alleged as a breach of contract by Respondent, the former

would have responsively pleaded the statute of limitations as a bar to the action (App. T).

In an opinion filed November 13, 1979 (App. D), the District Court determined that the administrative decision of the General Manager was not supported by substantial evidence and that the delay in the issuance of the Contracting Officer's final decisions was unreasonable. The court reiterated its conclusion that this case involved an implied action for breach of contract and that the applicable statute for implementing an award of interest was Title 15, § 109, D.C. Code. Furthermore, it was decided that interest would be awarded from the date Respondent first requested payment on its claims until Petitioner made payment, plus additional interest, in the statutory amount, on the sum of the foregoing, from the time of the equitable adjustments, i.e., January 17, 1977, until final payment of interest is made.

The court specifically rejected Petitioner's statute of limitations defense as being without merit because the "Court has characterized this action as an implied breach of contract action for purposes of fashioning appropriate relief" (App. C) and that the statute of limitations did not commence to run until final action by the Board of Contract Appeals had been concluded and, therefore, the breach of contract fashioned by the District Court was not untimely.

Thereafter, your Petitioner, on December 5, 1979, appealed this action to the United States Court of Appeals for the District of Columbia Circuit. That Court, in affirming the District Court's actions, extended the scope of the District Court's ruling by citing, in addition to Title 15, § 109 of the D.C. Code, also § 108, Prejudgment Interest on Liquidated Claims. If Respondent's claim is for a liquidated debt, it necessarily arose under the contract and thus does not amount to a breach of contract. The District Court was limited to a Wunderlich Act

type review of the record of the initial administrative hearing. However if the claim was for breach of contract, then Title 12, § 301, D.C. Code (App. J) should have been applied by the court to bar this claim.

## REASONS FOR GRANTING THIS PETITION FOR WRIT OF CERTIORARI

### A. Granting This Writ Will Resolve a Conflict Between Long-Standing Precedents of This Court and the Recent Ruling of the Court of Appeals for the District of Columbia Circuit.

The procedure utilized by the District Court and sanctioned by the Court of Appeals for the District of Columbia Circuit has overruled well-established and effective precedents of this Court favoring a single administrative resolution of disputes arising under public contracts, followed thereafter by limited judicial review pursuant to Wunderlich act principles.[5] This Court, in exercising its supervisory responsibilities over the United States Courts of Appeals (Article III, § 1, United States Constitution), has traditionally considered conflicts between its rulings

[5] The District Court acknowledged that its review of the dispute before it was limited by contract to principles and standards identical to those set forth in the Wunderlich Act, 41 U.S.C. §§ 321-322 (App. L). The language and principles of this Act are incorporated into the disputes article of the instant contract and provide that the administrative decision was final and conclusive unless it was determined to be unsupported by substantial evidence, arbitrary, capricious, or so grossly erroneous as to imply bad faith. However, the final resolution of all questions of law is reserved for the court solely upon the basis of the (initial) administrative record. In order to avoid these constraints on its judicial review authority, the District Court recharacterized the factual issue, as to the quantum of an equitable adjustment, before the Board of Contract Appeals to an action for implied breach of contract before the District Court. This matter was then remanded to the administrative tribunal for a *de novo* hearing as to whether Petitioner unreasonably delayed issuance of said final decisions.

and those of the Courts of Appeals as a valid basis for granting writs of certiorari. *Egan* v. *City of Aurora, Ill.*, 365 U.S. 515, 81 S.Ct. 684, 5 L.Ed.2d 741, on remand 291 F.2d 706 (1961).

The instant conflict is between the method utilized by the District Court in avoiding judicial review, which was sanctioned by the United States Court of Appeals for the District of Columbia Circuit in the case at bar, and this Court's prior rulings, particularly in *United States* v. *Carlo Bianchi & Company*, 373 U.S. 709, 83 S.Ct. 1409, 10 L.Ed.2d 652 (1963), as well as *United States* v. *Anthony Grace & Sons, Inc.*, 384 U.S. 424, 86 S.Ct. 1539, 16 L.Ed.2d 662 (1966), and *United States* v. *Utah Construction and Mining Company*, 384 U.S. 394, 86 S.Ct. 1545, 16 L.Ed.2d 642 (1966). *Bianchi* stands for the proposition that appellate review of an administrative proceeding pursuant to the standard disputes article is limited to consideration of the administrative record and a *de novo* hearing on the matter is barred.

The District Court refused to follow the unequivocal mandate of this Court in this line of cases and, instead of reviewing the administrative record under Wunderlich Act principles (App. L), as provided for by the contract disputes article (App. H), completely recharacterized the action as a *de novo* breach of contract for the contracting officer's failure timely to issue a final decision, a matter not raised by the evidence during the administrative hearing, and ruled that the denial of interest as part of the equitable adjustment by the Board of Contract Appeals presented a question of law. Cf. *Utah Construction and Mining, supra*, at 419-20. This Court has long held that the determination of an equitable adjustment under a Government contract presents a factual issue. *United States* v. *Callahan Walker Company*, 317 U.S. 56, 61, 63 S.Ct. 113, 87 L.Ed. 49, 53 (1942).

In view of the affirmation by the Court of Appeals of the District Court's action in this case, it can reasonably be anticipated that the District Court will continue to permit *de novo* consideration of such matters in lieu of limited judicial review under the contractually mandated Wunderlich Act principles. The failure of the courts below to follow this Court's mandate as expressed in *Bianchi* and *Utah* has created a contractual crisis for Petitioner inasmuch as the remaining United States District Courts having jurisdiction over its contracts (Maryland and the Eastern District of Virginia) have to date not followed the rationale utilized by the District of Columbia court in the case at bar. If this trend is permitted to continue, it will challenge *United States* v. *Carlo Bianchi & Co., supra,* which previously resolved this very issue. Cf. *Wells and Wells, Inc.* v. *United States,* 269 F.2d 412 (C.A. 8, 1959). For the present, however, Petitioner is confronted with venue shopping by its contractors seeking to avoid the contractually mandated Wunderlich type review of administrative hearings. Any contractor who has been less than successful in an administrative appeal would welcome the opportunity for a *de novo* hearing in order to recast its case and utilize evidence that it has intentionally or otherwise omitted.

The failure of the courts below to abide by these time-honored decisions of this Court has injected confusion into what has been a settled area of the law and warrants this Court's examination of this matter as an exercise of its supervisory powers. This can best be accomplished by granting a writ of certiorari.

### B. Judicial Economy Mandates Reversal of the Decision Below.

The District Court's treatment of the case at bar accorded Respondent two separate opportunities to litigate its claim for interest, first in the administrative proceed-

ing provided for in the contract (initial hearing), and thereafter by the *de novo* hearing on the District Court's remand. Respondent proffered no evidence in the initial hearing to support its claim for interest as a component of an equitable adjustment or on the basis of unreasonable delay in the issuance of the Contracting Officer's final decisions.

This Court, intent on encouraging judicial economy, has long favored limited review of an administrative determination. Historically, administrative findings were final and conclusive, absent a finding of fraud, bad faith, or implicit fraud, as far back as *Kihlberg* v. *United States*, 97 U.S. (7 Otto) 398, 24 L.Ed. 1106 (1878) and *Ripley* v. *United States*, 223 U.S. 695, 56 L.Ed. 614 (1912), and, more recently, *United States* v. *Callahan Walker Company*, *supra*, and *United States* v. *Carlo Bianchi and Company*, *supra*. Upon the enactment of the Wunderlich Act, 41 U.S.C. §§ 321-322 (App. L), it was established that the criteria for judicial review of administrative decisions would be that the "decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith or is not supported by substantial evidence" and it was also provided that "[n]o Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative or Board." These provisions are contained in the disputes articles of all Federal Government construction contracts. Petitioner utilizes the substantially identical disputes clause in its construction contracts (App. H). Consequently, the Wunderlich Act review criteria are binding upon the parties contractually if not by statute. This Court has held:

> "The disputes clause is a clear, unambiguous provision applicable at all times and binding on all parties to the contract. No court is justified in dis-

regarding its letter or spirit." *Crown Coat Front Co.* v. *United States*, 386 U.S. 503, 512, 87 S.Ct. 1177, 18 L.Ed.2d 256, 264 (1967).

In *Utah, supra*, this Court, discussing *United States* v. *Carlo Bianchi and Company*, said:

> "This is no more than our decision in *Carlo Bianchi* requires. We there held that administrative findings in the course of adjudicating claims within the disputes clause were not to be retried in the Court of Claims but were to be reviewed by that court on the administrative record. This result, which was required both by the contract of the parties and by the Wunderlich Act, avoids 'a needless duplication of evidentiary findings and a heavy additional burden in the time and expense required to bring litigation to an end,' 373 U.S., at 717, and it encourages the parties to make a complete disclosure at the administrative level, rather than holding evidence back for subsequent litigation. H. R. Rep. No. 1380, 83d Cong., 2d Sess., 5 (1954). These same reasons support the finality, in a suit for delay damages, of all valid and appropriate administrative findings already made in the course of resolving a dispute 'arising under' the contract."

This Court, in an effort to promote judicial economy, stated in *Bianchi*:

> "Moreover, the standards of review adopted in the Wunderlich Act—'arbitrary,' 'capricious,' and 'not supported by substantial evidence'—have frequently been used by Congress and have consistently been associated with a review limited to the administrative record. [Footnote omitted.] The term 'substantial evidence' in particular has become a term of art to describe the basis on which an administrative record is to be judged by a reviewing court. This standard goes to the reasonableness of what the agency did *on the basis of the evidence before it*, for a decision may be supported by substantial evi-

> dence even though it could be refuted by other evidence that was not presented to the decision-making body." (*Bianchi, supra*, at 715; emphasis in original.)

As in *Bianchi*, Respondent was accorded a full adversary hearing in the administrative proceeding, including the right to advance evidence on any theory for the recovery of interest, with an opportunity for judicial review thereafter; hence the retrial of the same matter ordered by the District Court was contrary to time-honored precedents of this Court. The District Court, in its effort to fashion a remedy, allowed Respondent a second evidentiary bite at the interest apple, thereby requiring Petitioner twice to defend against the identical claim.

Notwithstanding the existence of evidence that reflected delay in the issuance of the two final decisions in this action, Respondent, having omitted to bring same forward during the initial administrative hearing, was prohibited from relitigating the case, under the rule in *Bianchi*. Upon receiving an adverse decision, Respondent should not later be permitted to contend that Petitioner was unreasonable in denying interest inasmuch as the initial record before the Board of Contract Appeals was completely devoid of evidence supportive of that contention. Thus, the District Court erred in ordering and, thereafter, relying on the second administrative hearing in deciding this case.

Your Petitioner is now positioned as the Federal Government was during the debate leading to the Wunderlich Act with the exception that by virtue of its Compact, its administrative appeals are to the District Court and not to the Court of Claims.

> "It would not be possible to justify the retention of the finality clauses in Government contracts unless the hearing procedures were conducted in such a way as to require each party to present openly its

side of the controversy and afford an opportunity of rebuttal." H. R. Rep. No. 1380, 83d Cong., 2d Sess., 5; cited in *Bianchi, supra,* at 717.

Without the certainty that your Petitioner will be required to defend against claims under its contracts only once, no purpose is served in attempting to maintain its current administrative disputes procedure, including the administrative adversary trial proceeding which is identical to that mandated in the disputes procedure of Federal Government contracts prior to the Contract Disputes Act of 1978.

The consequences of the decision complained of extend to the District Courts having jurisdiction over Petitioner's cases, as these would also become unduly burdened. Petitioner currently has 350 docketed cases in varying stages of the administrative process. There are an additional 300 claims expected to be appealed administratively by July 1982. If these cases are now subjected to *de novo* hearings upon judicial review, or if the parties are granted an opportunity to supplement the administrative record, the three affected District Courts and the two Courts of Appeals will be inundated with this complicated construction litigation in lieu of the relatively simple limited Wunderlich type judicial review.

Not only does the established WMATA claims resolution procedure concern a substantial number of cases, but these cases generally involve multiple time-consuming issues. The complexity of these contract issues and the requirement expeditiously to decide the detailed engineering and construction disputes have been facilitated by the expertise of administrative judges who specialize in such matters. If the instant decision stands, the long term impact on the affected District Courts will be substantial, as these cases will proceed to the District Court for *de novo* trial in lieu of a judicially limited review of specified errors in the administrative proceeding. Thus this

Court's decision in *United States* v. *Carlo Bianchi & Company, supra,* will be rendered inutile.

### C. The WMATA Compact Mandates That the Court of Appeals for the District of Columbia Apply the Law Thereof.

This Court has in recent years acknowledged that issues concerning the interpretation and application of interstate compacts are federal questions, only finally resolvable by this Court. *Lake County Estates, Inc.* v. *Tahoe Regional Planning Agency,* 440 U.S. 391, 99 S.Ct. 1171, 59 L.Ed.2d 401 (1979). Thus when the Court of Appeals failed to heed the clear Congressional mandate to apply the District of Columbia statute of limitations (App. J) to this action, it created an issue resolvable only by this Court.

The District Court, having received the findings of fact after the second Board of Contract Appeals hearing, determined that Petitioner had breached its contract with Respondent by delaying issuance of its final decisions on two claims thereunder. The trial court then awarded Respondent interest for breach of contract pursuant to Title 15, § 109, District of Columbia Code (App. K) from the dates of initial notice of the respective claims (August 20, 1973, for the claim designated "double circuitry," [App. N], and December 13, 1973, for that designated "Wye interlocking," [App. M]). In so doing, the District Court relied on the WMATA Compact, § 80 (App. I), which provides in part that Petitioner shall be liable for its torts and contracts in accordance with the laws of the applicable signatory. Petitioner timely raised as a defense the District of Columbia statute of limitations (Title 12, § 301, D.C. Code; App. J), which is three years, noting that the claims arose on August 20, 1973, and December 13, 1973, respectively, whereas suit in the District Court was filed more than three years thereafter on April 14, 1977. The District Court held

that the District of Columbia statute of limitations as to contract matters was inapposite (App. C).

The refusal of the District Court to apply the District of Columbia statute of limitations (App. J) was erroneous inasmuch as § 80 of the WMATA Compact (App. I) requires the application of the appropriate law of the District of Columbia, Maryland, or Virginia to Petitioner's contract claims. District of Columbia law was recognized by the District Court as the controlling law in this action; hence the statute of limitations was applicable. On this point the District Court stated:

> "Defendent [WMATA] argues that this Court has *sua sponte* characterized this action as one based on an implied breach of contract and in so doing has deprived defendant of the opportunity to put forward a defense based on the statute of limitations. This argument fails to realize, however, that the Court has characterized this action as an implied breach of contract action for purposes of fashioning appropriate relief. Moreover, in an action properly before an appeals body, 'the statute of limitations thereon cannot commence to run until final board action occurs.' *Conn* v. *United States*, 366 F.2d 1019, 1021 (1966). This contract dispute, concerning the right of plaintiff to full compensation for the cost of labor and materials expended to complete changes and extra work that defendant WMATA ordered, was properly before the Board. The statute was therefore tolled during the period of the Board's deliberations and this action, commenced on April 14, 1977, is accordingly timely." (Opinion, C.A. 77-0657, Nov. 13, 1979; App. D)

The District of Columbia statute of limitations specifically provides that the three-year bar is applicable to breaches of contract, express or implied. It was therefore incomprehensible for the District Court in "fashioning appropriate relief" to award interest for an implied

breach of contract pursuant to one District of Columbia statute and totally to ignore the applicable District of Columbia statute barring such a claim. Breach of contract actions are not properly brought before a board of contract appeals for administrative resolution because breaches differ from disputes arising under the contract in that there is no remedy-granting clause available which would provide a basis for their relief. Apparently, the District Court did not comprehend that an action for breach of contract due to an unreasonable delay in issuing a final decision was immediately redressable in court. *Utah, supra.* The statute of limitations is tolled only as to disputes arising under the contract. *Crown Coat Front Company* v. *United States, supra,* 386 U.S. at 521-22. Where there is no administrative remedy to be exhausted, as in the case of a separate and distinct breach of contract, the statute of limitations is not tolled.

The Court of Appeals also declined to apply the rule of law in *Giant Food, Inc.* v. *Jack L. Bender,* 399 A.2d 1293, 1305 (1979), wherein the Court of Appeals for the District of Columbia stated:

> "Section 15-109 is inconsistent with Section 15-108 to the extent that it authorizes interest only on the judgment from the date of judgment, rather than on the principal amount due from the date due until the date paid.

At first blush the applicability of this case appears to be governed by the District of Columbia Self-Government and Reorganization Act, Title I § 431 D.C. Code, as amended; however, the issue in the instant case is the proper application of WMATA Compact § 80 (App. I), a federal statute. The law of the District of Columbia, as declared by its highest court, with respect to the inconsistency between Title 15, §§ 108 and 109 of the D.C.

Code, has been decided. The plain language of the WMATA Compact mandated the application of *Giant Food, supra,* to WMATA. (See *Erie Railroad Company* v. *Tompkins,* 304 U.S. 64, 58 Sup.Ct. 817, 82 L.Ed. 1188 (1938).

If the claims here were in fact liquidated,[6] as inferred by the Court of Appeals (App. A), then it was necessarily a claim cognizable under the Changes article, a remedy-granting clause (App. H). Acordingly, the District Court's review should have been limited to Wunderlich Act principles, and any entitlement to interest had to be resolved solely on the basis of the original administrative record where Respondent presented no evidence on this issue.

If the District Court was correct in concluding that the matter before it was a breach of contract action for delay in the issuance of the final decisions in this case, then the District of Columbia statute of limitations was applicable and Respondent's recovery should have been denied. Prior to the filing of its complaint before the District Court on April 14, 1977, Respondent had never claimed entitlement to interest for such delay. Thus the claims which arose more than three years prior to that date (*viz.*, August 30, 1973, and December 13, 1973, respectively) should have been denied as untimely.

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[6] It should be noted that neither the District Court nor the Court of Appeals acknowledges that WMATA is entitled to *any* time for the administrative resolution of these claims, given that the District Court dates the award of interest from the date the claims were first asserted. The administrative disputes procedure for which the parties contracted necessitates some reasonable amount of time for consideration of the claim, issuance of a final decision when warranted, and thirty additional days for the taking of an appeal. The award of interest during this period illustrates a complete misunderstanding of Government contracting principles and procedures.

## CONCLUSION

If the decision complained of is permitted to stand, Petitioner's ten-year system of resolving contract disputes upon Wunderlich Act principles on a uniform basis in all three of its political jurisdictions will suffer dramatically. The prospect of additional litigation in the already crowded courts is inapposite to the aims and standards of justice in the federal judiciary in the greater Washington metropolitan area. The necessity for two fact-finding trials on Petitioner's contract claims has seriously impaired the administrative resolution of disputes and will ultimately result in the litigation of all construction claims in the District Courts in the first instance. This increased burden on the affected District Courts and Courts of Appeals, for judges and support facilities to handle the *de novo* case loads, are highly detrimental consequences that may be anticipated as a result of the decisions below. Conservation of judicial resources is therefore a meaningful consideration in this matter.

The egregious aspect of this case is the refusal of the District Court and the Court of Appeals to follow *United States* v. *Carlo Bianchi & Company*, *supra*. That case considered and resolved the identical issue. There, this Court said that the legislative history of the Wunderlich Act "leaves little doubt that the review intended was one confined to the administrative record." *Bianchi* at 716. This matter is most worthy of detailed inquiry by this Court in the exercise of its supervisory authority, and it is for this and the additional reasons advanced herein that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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